Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection	)	CC Docket No. 01-318
	)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance	)	CC Docket No. 98-56
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141

JOINT REPLY COMMENTS OF DYNEGY GLOBAL COMMUNICATIONS, INC., e.spire COMMUNICATIONS, INC., ITC^DELTACOM, INC., KMC TELECOM, INC., NUVOX, INC., TALK AMERICA, INC., AND Z-TEL COMMUNICATIONS, INC.

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SUMMARY

The joint commenters support the creation of federal metrics to supplement State-specific measures in their comments submitted on January 22, 2002, and encourage the implementation of a federal enforcement plan to ensure compliance with the Act and the mandates of the Commission. Many of the comments filed by other parties support these actions, and none of the comments should cause the Commission to hesitate in implementing these measures expeditiously.

The Commission should supplement – but in no way supplant – State Commission performance metrics in order to measure the extent to which ILECs are failing to meet their obligations. While several of the ILECs encourage the replacement of state metrics with a federal plan, their motives are purely self-serving and completely at odds with the objectives of the Telecom Act. The parties that share the goal of local competition and seek the attendant benefits all endorse action that preserves the state measurement and enforcement plans.

In a significant display of solidarity, the comments filed by the State Commissions oppose any attempt to preempt or supplant the performance measures, standards and enforcement mechanisms established or being developed by the States and any limitation on their ability to do so in the future. With its national perspective, however, the Commission can support the broad, pro-competitive goals of the Telecom Act with a separate and distinct federal measurement plan. Using the uniform metrics it establishes, the Commission should institute a self-executing performance assurance plan that would apply to all major incumbents, efficiently supplementing the State-established plans. The Commission's supplemental plan must encompass all necessary network elements and ensure that each of the entry paths created in the Act remain irreversibly open to competition.

The ILECs have failed to set forth any reasonable basis for preemption, and instead acknowledge in several instances that no such authority exists. Nor have the ILECs demonstrated that the actions being considered by the Commission would create any unreasonable burdens. A reasonably constructed supplemental measurement plan would impose very little, if any, additional burden. In fact, a supplemental enforcement plan would have no impact whatsoever, provided the ILECs comply with the Act.

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I. INTRODUCTION

Dynegy Global Communications, Inc., e.spire Communications, Inc., ITC^DeltaCom, Inc., KMC Telecom, Inc., NuVox, Inc., Talk America, Inc. and Z-Tel Communications, Inc. (hereinafter the "Competitor Coalition") hereby submit these comments in response to the comments filed by various parties in this proceeding. The coalition believes that the market-opening mandates of the Telecommunications Act of 1996[1] will be furthered by Commission action to supplement State Commission performance metrics and enforcement

plans.[2] Many of the comments filed in this proceeding support this view, while none of the comments should cause the Commission to consider taking contrary action. In fact, even the largest ILEC in the country agrees that "the Act could be read to suggest a Congressional judgment that a regulatory regime that includes state-by-state performance reporting requirements in addition to national measurements would be consistent with the goals of the Act."[3]

"The Act authorizes the Commission to promulgate national performance measurements for interconnection and unbundled network elements and to require all carriers to report their performance under those measurements."[4] "The Act also requires the Commission to set performance standards" that are consistent with the Act.[5] For several years, the Commission has ordered the ILECs to provide interconnection and access to network elements in accordance with the Telecom Act so that the public could reap the benefits of local competition – better service, lower rates, less regulation, technological innovation and economic growth. To ensure full compliance with the Act, Commission monitoring of performance and implementation of enforcement mechanisms is necessary and appropriate.

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1 Codified at 47 U.S.C. §151, *et. seq.* ("Telecom Act").

2 The members of the Competitor Coalition are absolutely opposed to any action that would preempt or supercede current and future State plans.

3 Comments of the Verizon Telephone Companies, January 22, 2002, CC Docket 01-318, at page 24 (*Verizon Comments).*

4 *Verizon Comments* at page ii.

5 *Id.*

II. THE FCC SHOULD HEED THE COMMENTS OF THE PARTIES THAT SHARE THE COMMISSION'S GOALS

A. The State Commissions Seek Full Local Competition, and Endorse Federal Performance Measures and Enforcement Mechanisms That Preserve State Authority

The State Commissions are on the side of the FCC, and share its interest in full implementation of the Telecom Act. As one commission noted, the State Commissions have a "keen interest" in "ensuring the commencement and growth of competition in the local exchange market."[6] The States have expended untold resources in attempting to bring the benefits of local competition to their constituents. Acting in accordance with the cooperative federalism scheme established by Congress,[7] the states have set UNE rates, arbitrated interconnection agreements, resolved intercarrier disputes, enforced unbundling requirements, established performance measures and standards, and created performance assurance plans. The Commission should build on the work done by the States, and use the State Commissions as an ally in the fight to ensure that the framework for local competition is clearly established and effectively enforced. Acceding to the self-serving requests of the ILECs and fighting the competition-minded Commissions would lead to endless litigation and gridlock, and would do tremendous harm to the prospects for local competition.

In a significant display of solidarity, the comments filed by the State Commissions oppose any attempt to preempt or supplant the performance measures, standards

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[6] Comments of the Colorado Public Utility Commission (*CO PUC*) at page 3. "State commissions have a powerful incentive to take prompt and decisive action to address problems." *Id.* at page 6.

[7] *See, for example, CO PUC Comments* at pages 2-3 ("[T]he Act unequivocally embraces a cooperative relationship between the Commission and the state commissions. Each partner in the relationship – federal and state - has a vital and distinct role").

and enforcement mechanisms established or being developed by the States, and any limitation on their ability to do so in the future.[8] As the Commission is well aware, the States have worked with the industry to develop geographically relevant and ILEC-specific performance measures and standards. There is simply no way to replace them with an equally effective federal scheme.[9]

The State Commission filings are consistent with the approach recommended by the Competitor Coalition. While all are against federal preemption on this issue, the recommendations that flow from that uniform position contain slight variations. Some States support the idea that the federal plan act as a default scheme where there are no metrics in place,[10] while others suggest it serve as a minimum plan that can be built upon as needed.[11]

While all of these approaches are consistent with the Competitor Coalition proposal to supplement the State metrics with a separate set of federal measurements, the Texas Commission specifically endorses this approach. The Texas PUC states that FCC action that

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[8] *See, for example,* Comments of the California Public Utility Commission (*CPUC*) at page 5; Colorado Office of Consumer Counsel (*CO OCC*) at pages 2-3; *CO PUC* at page 4; Florida Public Service Commission (*FPSC*) at page 2; Minnesota Department of Commerce (*MN DOC*) at page 2; Public Service Commission of Missouri (*MO PSC*) at page 3; New York Department of Public Service (*NY DPS*) at page 2; Public Utility Commission of Ohio (*PUCO*) at pages 2-6; Oklahoma Corporation Commission (*OCC*) at page 3; Oregon PUC (*OPUC*); Texas Public Utility Commission (*TX PUC*) at page 3, and Virginia State Corporation Commission Staff (*VSCC*) at page 2.

[9] Even SBC acknowledges, as it must, that "a 'one size fits all' national performance standard could not possibly take into account all the myriad differences" in ILEC networks and systems, or in regulatory environments. Comments of SBC Communication Inc., CC Docket 01-318, January 22, 2002, at page 33. (*SBC Comments*).

[10] *See, for example, OCC Comments* at page 3; *NY DPS Comments* at pages 1-2, and *VSCC Comments* at page 2.

[11] *See, for example CPUC Comments* at page 4; *FPSC Comments* at page 3; *MN DOC Comments* at page 2; *NY DPS Comments* at page 2; *PUCO Comments* at page 2; *OCC Comments* at page 3; *TX PUC Comments* at page 3, and *VSCC Comments* at page 2.

"establishes consistent, minimum requirements or supplements the state plans will further facilitate competition" provided the Commission action meets certain thresholds.[12] In addition, the California Commission agrees with the coalition that "performance standards and measures must apply to all incumbent LECs, since they are the carriers with bottleneck control of essential facilities and services necessary for competitors to access . . . if truly competitive markets are to develop."[13]

Regardless of the specific approach adopted, the Commission must resist utilizing a least common denominator approach.[14] Instead, the Commission should strive to adopt standards that reflect the abilities of the ILEC with the best practices in a certain arena. Thus, for example, if a commission in the Verizon region determined that it was feasible for Verizon to meet a certain, higher standard for loop installations, it would be eminently reasonable for this Commission to determine that all RBOCs and similarly situated incumbent carriers should adopt whatever practices Verizon has employed (or been forced to employ) and hold them to same standard. This would motivate the ILECs to seek out and adopt the best practices for all items measured under the federal plan, and would promote competitive growth in all areas of the country.

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[12] *TX PUC Comments* at page 3. The TX PUC notes that the requirements ultimately adopted must be "1) minimally, as stringent as the strongest state plans; and 2) do not preclude the states from adopting additional measures to the extent they are necessary."

[13] *CPUC Comments* at page 6. The CPUC also appropriately points out that, in light of the purpose of the performance standards, it "does not make sense to apply them to the competitive LECs." *Id.* The Competitor Coalition wholeheartedly agrees, since no one CLEC has even 10% of any local exchange market.

[14] *See, for example, FL PSC Comments* at page 2, *TX PUC Comments* at page 3, and Comments of the Competitive Telecommunications Association at page 6 (*CompTel Comments*).

The Commission is uniquely positioned to build upon State efforts and take action to support the broad, pro-competitive goals of the Telecom Act. It must resist calls to undermine these efforts or forego the opportunity to supplement them. According to the State Commissions themselves, any existing differences in metric definitions and plans exist for good reason.[15] Even SBC acknowledges that the Commission recognizes that metric definitions will likely vary among states.[16] These differences, however, will narrow over time, and remain only where needed.[17]

Commission action to undermine or eliminate the enforcement plans would deal a tremendous blow to competition and impede the long-terms goals of the Commission. Many states have effective enforcement plans that were instituted voluntarily (most often as part of the quest for §271 authority). Quite often, the FCC and the State Commissions lack the jurisdiction to replace them with equally effective plans.[18] It is entirely foreseeable that the ILECs would likely seize Commission action that undermines the State plans as an opportunity to attempt a reduction in their exposure for substandard performance. The ILECs would certainly fight any future attempts to ensure adequate performance through enforcement plans. It is therefore

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[15] *NY DPS Comments* at page 2 ("it should be presumed that any differences among state monitoring efforts reflect actual differences among the carriers, facilities, and markets in those states"); *See also OK PUC Comments* at page 2, and *PUCO Comments* at pages 10-12.

[16] *SBC Comments* at page 34, *citing Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, at ¶55 (1999) ("*New York 271 Order*"), *aff'd*, *AT&T v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

[17] *NY DPS Comments* at page 2 ("the various state and federal monitoring programs will converge naturally over time. Differences among them will likely remain only where such differences are truly relevant."); *OK PUC Comments* at page 3.

[18] *See, for example, MN DOC Comments* at pages 2-3; *OCC Comments* at pages 3-4.

essential that the Commission not interfere with the state performance assurance and remedy plans.[19]

These state measurements and plans can, however, be efficiently supplemented by federal metrics and enforcement without undermining their effectiveness. The FCC should independently measure those items that it believes are important in promoting the goals of the Telecom Act. The Competitor Coalition therefore supports the adoption of the metrics set forth in the NPRM, as implemented and augmented by WorldCom's proposed measures, to supplement the performance metrics adopted by the States.

B. The Self-Serving ILEC Arguments Are Inconsistent With The Goals Of The FCC And State Commissions And Must Be Rejected

The ILECs do not have the best interests of the end users in mind when they argue for the preemption of the state metrics.[20] In light of their corporate obligation to maximize shareholder wealth, their goal is to resist the onset of local competition by fighting at every plane. Consistent with that objective, they also seek to minimize plans that attempt to ensure adequate performance to competitors, regardless of whether it is done through monetary or non-monetary means.

The ILEC comments, as expected, attempt to obfuscate and mislead. The ILECs sidestep the real issue of their lack of compliance six years after the Telecom Act became law, and instead speak of illusory burdens, decreased regulation and feigned altruism. The truth of the matter is that if the ILECs had just complied with the Act the present inquiry would be

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[19] *See, for example, PUCO Comments* at page 6.

[20] The one notable exception to this is Qwest Communications.

unnecessary. Had they complied, competition would be flourishing and deregulation would be an appropriate subject. Instead, any talk of deregulation while the ILECs continue to thwart competition – and mock the very concept[21] – is truly nonsensical.

In the initial comments, the Competitor Coalition sets forth several reasons why uniform national standards that supplement state standards would be useful. Among those is that FCC-established measures and standards would permit benchmarking across ILECs – something that is currently very difficult to accomplish. In their verve to fight these, in light of the benefits to competition they will bring, the ILECs actually make several important points that favor the establishment of uniform federal measures. In its comments, for example, Verizon states that permitting "other ILECs to provide CLECs with inferior service" would "violate the 1996 Act."[22] Thus, as Verizon recognizes, the Act requires each and every ILEC to provide competitive carriers with a nationally uniform, minimum level of service.

In addition, Verizon asserts that national measurements will not effectively measure the extent to which an ILEC is or is not providing nondiscriminatory access.[23] Verizon does not, however, challenge the notion that uniform federal metrics will be very useful in ensuring that every ILEC performs in a minimally satisfactory manner.[24] It is critically important for the Commission to measure performance on both of these bases. Finally, while

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[21] *See, for example,* Remarks of Verizon Co-CEO Ivan Seidenberg at Goldman Sachs Conference, during which called "this whole scheme of CLEC interconnection a joke." *The Washington Times*, October 23, 2001.

[22] *Verizon Comments* at page 24.

[23] *Verizon Comments* at page 20.

[24] Verizon does, of course, dispute the relevancy of this gauge, overlooking the fact that the Commission has devoted tremendous efforts to establish unbundling and access rules, pursuant to the authority in the Act itself (*e.g.* 47 U.S.C. §251(d)(1)).

asserting that there "*may* be instances in which ILECs employ different . . . processes,"[25] Verizon is conceding that there are certainly other instances in which the processes are the same and therefore are amenable to uniform measurement. The CLEC, ILEC and State Commission comments all indicate that the Commission should establish uniform federal measures to supplement the state-specific measures.

The Competitor Coalition comments suggest applying a minimally burdensome set of metrics to medium and large ILECs, including those that are left out of the current requirements, so that competition does not stop at the large city boundaries. The ILECs, as anticipated, oppose such requirements. These ILECs argue, for example, that the measures should not apply if an ILEC is not already subject to reporting and claim that such action would increase burdens on mid-sized and small ILECs.[26] While logically sound, this argument is clearly lacking in reason. If an ILEC is not already reporting its performance, it is very difficult to determine whether the incumbent is complying with the Act. The question is not simply one of burden, but rather one of cost v. benefit. If the Commission wants competition outside of the large cities, it will certainly want to measure whether the markets of those ILECs whose performance is not being measured are open to competition.

The ILECs also argue that metric reporting obligations should be triggered when "abuse" is found.[27] How, it must be asked, will abuse be uncovered unless performance is

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[25] *Verizon Comments* at page 21 (*emphasis added*).

[26] *See, for example,* Comments of Cincinnati Bell, January 22, 2002, CC Docket 01-318, at page 2 (*Cincinnati Bell Comments*).

[27] *Id.* at page 3.

measured? The Commission must proactively measure performance in order to deter substandard performance, detect it when it occurs, and prevent its reoccurrence.

Permitting performance metrics to be negotiated bilaterally instead of establishing them uniformly is another ILEC foil.[28] While the Competitor Coalition fully supports the idea of ILECs agreeing to exceed the small number of federal metrics on a bilateral basis, past experience dictates that this cannot be relied upon. Verizon, for example, made a commitment to the New York Public Service Commission that "performance standards and remedies" in interconnection agreements "will continue to be offered by Bell Atlantic-NY in subsequent negotiations" as agreements expire, and "similarly will be negotiated in good faith with other CLECs who request negotiation of such terms and conditions."[29] Verizon has not honored this commitment. It has claimed, variably, that the clause applies only to carriers who had remedies in their then-effective agreements, and that existing contract-specific remedies should be deleted in their entirety.[30]

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[28] *Id.* at page 5.

[29] *Petition of New York Telephone Company for Approval of Its Statement of Generally Available Terms and Conditions pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry pursuant to Section 271 of the Telecommunications Act of 1996*, New York Public Service Commission Case 97-C-0271, Pre-filing Statement of Bell Atlantic-New York, dated April 6, 1998, at page 2.

[30] In a very recent arbitration, for example, Verizon proposed "deleting contract-specific measurements of and remedies for performance failures altogether," and even sought re-hearing when it lost the issue. *Joint Petition of AT&T Communications of New York, Inc., TCG New York Inc. and ACC Telecom Corp. Pursuant to Section 252(c) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc.*, New York Public Service Commission Case 01-C-0095, Order on Rehearing (Issued and Effective December 5, 2001) at page 2.

Finally, the ILECs claim that action to establish uniform metrics in accordance with the Notice[31] would not be deregulatory.[32] Compliance with the Act leads to competition, which lays the foundation for deregulation. Deregulation without competition leads to perpetual monopolization.

C. The ILECs Provide No Support For Their Argument That Federal Metrics Should Supplant State-Established Measures

Those ILECs that argue for supplanting the State metrics put forth inconsistent and insupportable arguments. Qwest, to its credit, proposes that the Commission "defer to the states"[33] and "does not . . . challenge the Commission's authority to obtain information from ILECs on the provision of UNEs" – positions that the Competitor Coalition supports.[34] Any federal plan must supplement and not disrupt the State plans.

Fellow RBOC BellSouth recognizes that the Act applies uniformly to all carriers nationwide, and that uniform metrics and standards are therefore appropriate.[35] The Competitor Coalition and BellSouth are in agreement that "the development of measurements to monitor compliance with the applicable aspects of the Act should also be uniform," and that "from a

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[31] *Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, Notice of Proposed Rulemaking, released November 19, 2001 (*NPRM or Notice*).

[32] *Cincinnati Bell Comments* at page 8.

[33] Comments of Qwest Communications International Inc., CC Docket 01-318, January 22, 2002, at page 4 (*Qwest Comments*).

[34] *Qwest Comments* at page 3. The coalition disagrees, however, that a separate layer of federal reporting requirements would be "unnecessary and counterproductive" (*Id.*) for the reasons stated herein.

[35] Comments of BellSouth, CC Docket 01-318, January 22, 2002, at pages 15. (*BellSouth Comments*).

policy standpoint, a national standard is also appropriate."[36] Where we differ is in the belief that national and State-specific standards can appropriately coexist.

Unlike Qwest, BellSouth argues for preemption. BellSouth, however, offers no legal authority whatsoever in support of its position, proffering instead only a brief policy statement.[37] In proposing the elimination of the State plans (a position the Competitor Coalition vigorously opposes) BellSouth acknowledges that its approach may be "somewhat harsh" in that it would undo the work of many States and admits that "[v]irtually all we now know about the proper structure of a measurement plan has resulted from the efforts of State Commissions."[38] That being the case, and there being no legal support for preemption, BellSouth all but concedes that the Commission might instead choose to supplement the state plans and thereby achieve the benefits even BellSouth recognizes.[39]

The comments submitted by SBC Communications are remarkably inconsistent. SBC seeks preemption of the State plans and proposes that it be subject only to the nine measures it proposes supplant State measures – except, that is, in the context of pending §271 evaluations.[40] SBC apparently wants to be measured pre-271 according to one set of standards, and then have the standards modified and minimized once it has gained interLATA authority.

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36 *Id.*

37 *Id.* at pages 15-16.

38 *Id.* at page 16.

39 "[T]he national plan must be implemented in a way that accommodates the efforts of State Commissions and the decisions that they have made." *BellSouth Comments* at page 17. BellSouth proposes, as its "less desirable" alternative, a non-mandatory federal plan, that States could decide to use or migrate to in the future. *Id.* at pages 17-18.

40 *SBC Comments* at pages 2, 10-11.

The SBC approach of less performance measurement after Section 271 authority is granted is directly contrary to the intent behind the performance assurance (*a.k.a.* anti-backsliding) plans.

The intent of the post-271 assurance plans is to protect against backsliding and to ensure that the RBOC continues to provide service to competitors at the levels the Commission deemed appropriate in granting interLATA authority, using the measures on which its performance was gauged during the review process. The Commission, the Department of Justice, and the State Commissions recognized that the potential for in-region interLATA authority created a strong incentive to comply with the Act, but that the incentive was removed once a Section 271 application was granted.[41] Logic therefore dictates that post-interLATA entry performance plans must be at least as comprehensive as the pre-entry measurement plans.[42] In fact, SBC's approach would compel the Commission to reexamine each of the Section 271 applications that have been approved for public interest compliance.

SBC puts forth vague, general statements of authority in its attempts to support the preemption argument. While arguing that the Telecom Act establishes a "national policy framework" and grants the Commission authority to implement that framework,[43] SBC points to absolutely nothing to support its claim that the Commission could or should eliminate state

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41 *See, for example, New York §271 Order* at ¶¶428-436; *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Evaluation of the New York Public Service Commission, CC Docket 99-295, at page 172.

42 The self-serving nature of SBC's position is abundantly clear. SBC asserts that it would be "unnecessarily disruptive" to alter the measures in the midst of a Section 271 review, and that such action could "delay the timely review" of an application. *SBC Comments* at page 11. At its essence, SBC is arguing that the system be changed to facilitate its own objectives wherever possible.

43 *SBC Comments* at page 9. As more fully set forth in its initial comments, the Competitor Coalition agrees with both these points.

performance measures and standards. Unfortunately for SBC, Section 251(d)(3) *specifically preserves* State regulation that is consistent with Section 251 and Title II, Part II of the Act.[44] State measurement and enforcement plans certainly fall within that category since they are pro-competitive and ultimately deregulatory.

Effectively rebutting SBC's position, Verizon "concludes that the Commission does not have clear statutory authority to preempt the existing state performance measurement regimes [.]"[45] In what would be an unprecedented stretch and indefensible interpretation of the language in Section 251(d)(3)(C), Verizon, however, suggests a finding that the pro-competitive actions of the State Commissions "substantially prevent" implementation of the pro-competitive provisions of the Act.[46] Verizon fails to engage in any traditional preemption analysis to support its position. In the end, Verizon ultimately acknowledges the futility of this argument, conceding that "numerous provisions of the 1996 Act preserve state commission authority, and [that] some of these provisions specifically contemplate that states will impose their own interconnection and access obligations."[47]

First and foremost, the Competitor Coalition believes that any action taken by the Commission in this proceeding must not preempt state performance plans. The Coalition supports the creation of a set of supplemental, uniform federal metrics that would enable the Commission to benchmark the performance of each ILEC and therefore draw important conclusions about carrier compliance with the Commission's rules and about the ubiquity of

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[44] 47 U.S.C. §251(d)(3). *See also*, *CompTel Comments* at page 4.

[45] *Verizon Comments* at page 47.

[46] *Id.* at pages 47-48, *citing* 47 U.S.C. §251(d)(3)(C).

[47] *Verizon Comments* at pages 48-49.

local competition. These measures could effectively supplement the very detailed and comprehensive State plans, which resulted from extensive proceedings and demonstrate the expertise of the agencies that are most familiar with location-specific issues, and could greatly assist those State Commissions that may not have authority to implement effective performance plans.

The incumbent LECs that argue in favor of eliminating the state plans concede that the Commission lacks the clear authority to do so and seek, in the name of "uniformity," unwarranted federal action that would ultimately harm the public interest (in favor of their shareholders). Furthermore, preemption would undercut the intent of the Act, derail the current Section 271 process, and force the reevaluation of all approvals to date. Since such action is so clearly unwarranted and adverse to the public interest, the Commission should instead institute a limited supplemental plan and reap the benefits of an approach that yields both state-specific and federally uniform measurements.

D. The List of Metrics Proposed in the NPRM Must Be Supplemented to Measure Several Other Significant Activities

The list of measurements in the NPRM provides a useful starting point for establishing an effective set of federal measurements. A list of measures that fails to comprehensively capture all essential aspects of the ILEC-CLEC relationship may, however, send incorrect market signals and create perverse incentives for ILECs to discriminate against a particular group of market entrants. In other words, Commission monitoring of performance to a limited set of carriers could be interpreted as implicit approval to discriminate against those to

whom performance is not being monitored. A comprehensive performance plan that covers all forms of entry is therefore essential.[48]

Congress created three methods of competitive entry in the Act – resale, unbundled network elements, and facilities-based. Congress clearly wanted all three methods of entry to be implemented by the Commission and the States, and ensured that each entry path was represented in Section 251 and the Competitive Checklist.[49] While the Act grants implementation authority to the Commission, it does not grant the Commission authority to tip the scales in favor of one mode of entry versus another. An incomplete performance plan which fails to ensure that each permissible entry path is open would, however, arbitrarily favor certain modes of entry since the ILECs are likely to discriminate against those paths not being monitored.[50]

In accordance with the Commission's statutory role, the Competitor Coalition supports the adoption of the metrics set forth in the Notice, as further defined and supplemented by the measurements, definitions and standards proposed by WorldCom in this proceeding. The Competitor Coalition identified several measures that encompass performance critical to their business plans, including measures from all service domains (pre-ordering to billing) and all

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[48] The Texas PUC agrees. *TX PUC Comments* at pages 5-6 ("the apparent omission of resale and UNE-P from the proposed measurements will have a chilling effect on a significant segment of the competitive market").

[49] 47 U.S.C. §271(c)(2)(B).

[50] Action to favor one form of entry over the others could bring claims that the Commission is acting in an arbitrary and capricious manner and in excess of its authority under the Act, which would delay the effectiveness of its actions.

essential UNEs and UNE combinations (including POTS elements and high capacity circuits).[51] In addition to eleven of the twelve NPRM measurements, the Coalition specifically encouraged the Commission to adopt the following eight metrics and incorporate them into the federal measurement plan:[52]

4.	*(a) Percent of Software Errors Corrected in X Days*
	(b) Average Delay for Resolution of OSS Problems
7.	*Flow-Through Percentage*
15.	*Percent of Coordinated Hot Cut Conversions Completed On Time*
New[53]	*Percentage of Orders Held for Lack of Facilities*
23.	*Percent Trunk Blocking*
25.	*(a) Percentage of Collocation and Augment Appointments Met*
	(b) Average Collocation and Augment Interval
27.	*Timeliness of Daily Usage Feed*
28.	*Timeliness of Carrier Invoice*

In response to the Commission's inquiry as to whether billing performance should be measured, many different commenters responded in the affirmative.[54] Even Verizon "proposes that the Commission add a billing timeliness measurement . . . to its list of national

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[51] Where disaggregation is required, the coalition proposes that each measure include the following products: UNE-Loops (two-wire, four-wire, DS-1, DS-3 and OC-n); UNE-Platform (residential and multi-line business); EELs; Inter-Office Transport (DS-1, DS-3 and OC-n), and Trunking (DS-3 and OC-n). Many of the State Commissions agree. *See, e.g., TX PUC Comments* at page 6 ("[i]t is important for the measurements to include all loop types").

[52] The metric numbers listed correspond to the list of metrics proposed by WorldCom.

[53] This metric would capture the number of orders that are not completed within the standard interval for facilities-related reasons (both lack of facility and defective facility situations). This measurement was partially captured in the disaggregation of WorldCom metric 14, Percent of Orders Completed On Time, and was included as Exhibit 7 to the Joint Comments of BTI, Cavalier, DSLnet, Network Telephone and RCN. This measure could be used instead of the missed appointment percentage measurement, as contemplated at ¶60 of the NPRM, since the on-time percentage metric would capture what is essentially the flip-side of the data that would otherwise be captured by that measure.

performance measurements."[55] SBC, on the other hand, makes the preposterous assertion that "to the extent that ILECs' bills for UNEs are received 'late' by CLECs, the cash flow positions of CLECs are improved."[56] The Competitor Coalition supports the implementation of billing timelines metrics, and rejects SBC's "offer" of cash flow assistance by sending late bills. The receipt of timely bills is only half the battle, however, since billing accuracy is also critical to competitors. The timeliness measures must count as timely only those bills that are complete when sent. To do otherwise would permit ILECs to send out error-ridden or incomplete bills, that would be useless to competitors but that would permit the ILECs to meet the metric.

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[54] *See, for example, MN DOC Comments* at page 3; *PUCO Comments* at pages 11-12.

[55] *Verizon Comments* at page 59.

[56] *SBC Comments* at page 30.

III. THE FCC HAS THE AUTHORITY TO ESTABLISH A SUPPLEMENTAL FEDERAL PERFORMANCE PLAN

As discussed above, so long as State plans are not preempted, a federal enforcement plan could be an important tool to ensure that all ILECs comply with their §251 obligations, as interpreted by this Commission in its rules and orders. Such a federal plan would be particularly useful to those States that may not have authority to implement their own plans, and in those instances where an ILEC is not subject to the Section 271 limitations.[57] The Competitor Coalition supports the creation of a supplemental federal enforcement plan that would contain fewer metrics than the State plans and contain lower penalties at the outset. The utility of the plan is that it would support and require compliance with federal policies and provide an important enforcement mechanism.

As acknowledged in the Notice,[58] the Commission can draw upon multiple sources of authority in developing a self-executing enforcement plan.[59] Sections 201 and 202, permit the Commission to specify what practices are just and reasonable, and denote what would constitute unjust or unreasonable discrimination, preference, prejudice or disadvantage. Sections 206 and 207 provide authority to determine liability and award damages to the aggrieved party for violations of the established standards, while Section 208 provides investigative, determinative, and appellate provisions. [60]

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[57] 47 U.S.C. §271(a) and (b).

[58] NPRM at ¶21.

[59] 47 U.S.C. §§ 201-202, 206-208 and 503 each provide support for an enforcement plan.

[60] As noted in the initial comments, Section 503(b), which was specifically referenced in the Notice at ¶¶21-22, provides a separate source of authority for the FCC to penalize ILECs for failing to "comply with any of the provisions of [the] Act or of any rule, regulation, or order issued by the Commission under [the] Act." 47 U.S.C. §503(b)(1)(B).

The ILECs, not surprisingly, generally argue against the creation of an enforcement plan.[61] None of the filed comments, however, should cause the Commission to hesitate in developing an effective plan based on the authority provided in the Act. The obstacles that the ILECs attempt to place in the way of a self-executing plan are primarily procedural.[62] In constructing a self-executing enforcement plan, however, the Commission could adequately address all due process considerations.

First, the Commission could establish, with appropriate notice and opportunity for comment, what performance it deems adequate and set corresponding benchmarks.[63] Second, the Commission could determine through appropriate processes the payment levels that would result from the failure of an ILEC to meet each particular performance standard. Finally, the Commission could establish procedures for payment of the predetermined figure and prescribe any necessary review procedures.[64] Aggrieved competitors could, of course, also exercise any private legal rights against the violating carrier.[65]

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[61] *See, for example, Qwest Comments* at page 2, *SBC Comments* at pages 34-41.

[62] *See SBC Comments* at page 35, for example.

[63] This is consistent with recent Commission precedent that penalized SBC for substandard performance in providing access to UNEs. *SBC Communications, Inc. Apparent Liability for Forfeiture,* Notice of Apparent Liability for Forfeiture, File No. EB-01-IH-0030, Released January 18, 2002.

[64] If absolutely necessary, the Commission might also permit the ILEC to demonstrate that the failure was truly due to factors outside of its control (*e.g.* catastrophic events) to address the concerns raised at page 38 of the *SBC Comments*. Even SBC acknowledges that an enforcement plan would satisfy its due process concerns if it "gave SBC an opportunity to show that such damages were unwarranted in that particular case." (*SBC Comments* at page 40) The assessment of penalties could also be deemed a "final order" pursuant to Section 208(b)(3), subject to appeal as provided therein. The Commission would need to specifically circumscribe the circumstances under which appeals may be pursued to thwart ILEC attempts to frustrate the self-executing nature of the enforcement plan.

[65] Such as those based in an interconnection agreement or grounded in the antitrust laws, for example.

In sum, the Act provides a solid legal basis for the establishment of a metrics-based enforcement plan, and grants more than enough authority for the Commission to establish such a plan to ensure compliance with the Act. The filed comments clearly support a finding to that effect.

IV. CONCLUSION

The initial comments submitted in this proceeding support both the creation of uniform federal metrics to supplement State-specific metrics and the implementation of a federal enforcement plan, to effectively ensure compliance with the Act and the orders and rules of the Commission.

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